TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924 1925

No. 80

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES, PETITIONERS,

vs.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, ET AL., ETC.

No. 81

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, ET AL., ETC., PETITIONERS,

vs.

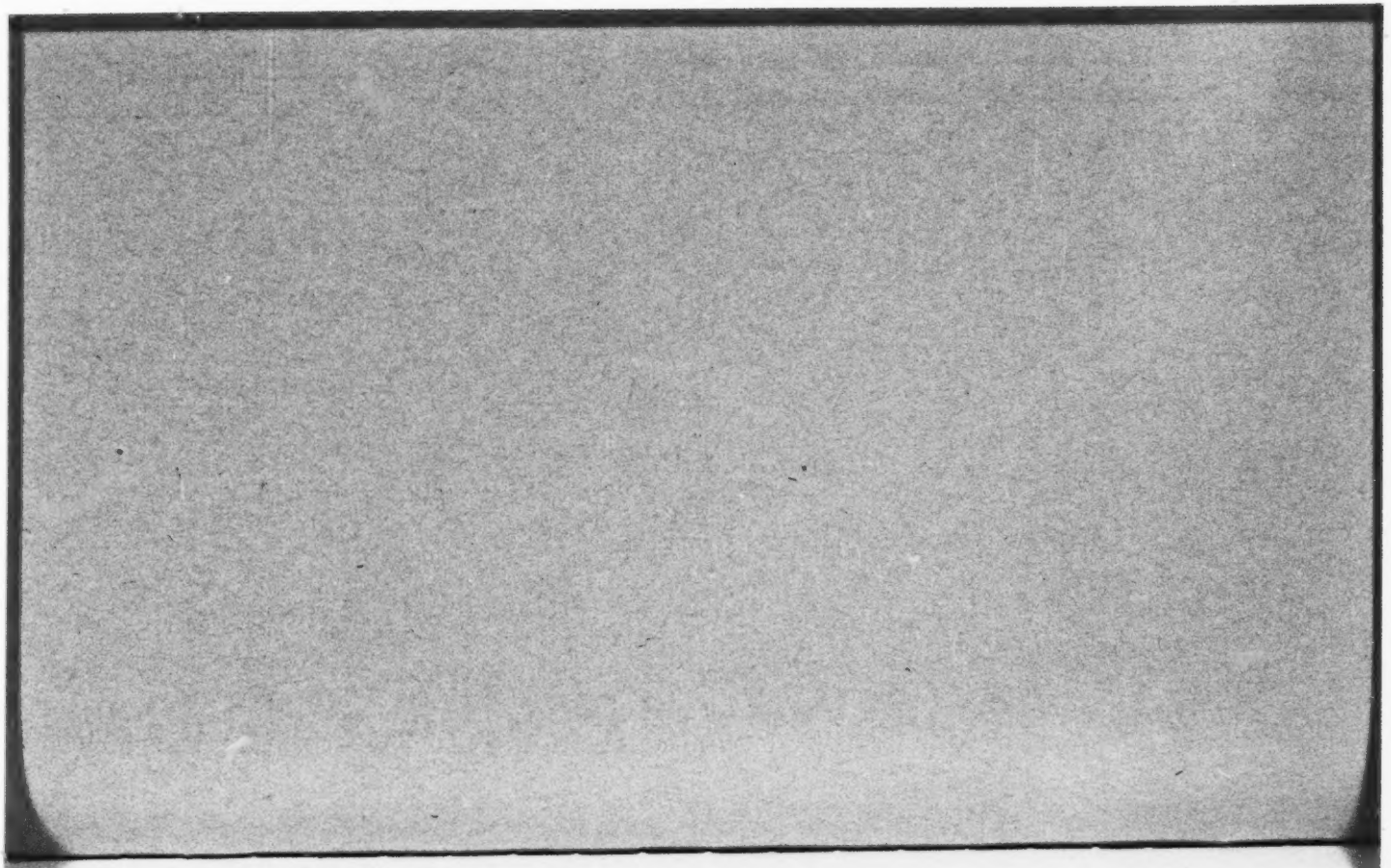
THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN; FRANK WHITE, AS TREASURER OF THE UNITED STATES, AND CARL JOERGER ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED MAY 31, 1924

CERTIORARI GRANTED JUNE 9, 1924

(30,383, 30,384)



(30,383, 30,384)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 420

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES, PETITIONERS,

vs.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, ET AL., ETC.

No. 421

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, ET AL., ETC., PETITIONERS,

vs.

THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN; FRANK WHITE, AS TREASURER OF THE UNITED STATES, AND CARL JOERGER ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from the district court of the United States, southern district of New York	1	1
Bill of complaint in case No. E22/308	1	1

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	Original	Print
Exhibit A—Letter from Delbruck, Schickler & Co. to Ladenburg, Thalmann & Co., January 6, 1920	7	4
Subpœna	8	4
Motion to dismiss	10	5
Order overruling motion to dismiss	12	5
Answer	14	6
Statement of evidence	19	8
Opinion, Hand, J., in case No. 22-206	24	10
Opinion in case No. 22-308	27	11
Final decree in case No. 22-308	32	13
Assignment of errors, defendants below, 22-308	34	14
Assignments of error, plaintiffs below, case No. 22-308	37	15
Notice of appeal, defendants below, case 22-308	39	16
Notice of appeal, plaintiffs below, case 22-308	41	16
Petition for appeal of defendants below, case 22-308	43	17
Petition for appeal of plaintiffs below, case 22-308	45	17
Order allowing appeal of defendants below, case 22-308	47	18
Order allowing appeal of plaintiffs below, case 22-308	49	19
Citation (omitted in printing)	52	19
Stipulation re transcript of record, case 22-308	55	20
Clerk's certificate, 22-308	57	20
Proceedings in United States circuit court of appeals for second circuit	59	21
Opinion, Manton, J.	59	21
Judgment	70	27
Petition for rehearing	72	28
Order overruling petition for rehearing	79	31
Clerk's certificate	81	31
Orders granting petitions for certiorari	82	32

[fol. 1] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

E22/308. In Equity

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ ROSENTHAL, SIDNEY H. MARCH, RUDOLPH METZ and HARRY B. LAKE, and ANNA THALMANN and MORITZ ROSENTHAL, as Trustees of the Estate of Ernst Thalmann, Deceased, Copartners, Doing Business under the Firm Name and Style of Ladenburg, Thalmann & Co., Plaintiffs,

against

THOMAS WOODNUT MILLER, AS ALIEN PROPERTY CUSTODIAN; FRANK White, as Treasurer of the United States, and Carl Joerger, Gustaf Ratjen, Ludwig, Korte, Arthur Freiherr von Schickler, Margarete Grafin von Pourtales, Estate of Ludwig Delbruck, Deceased, Copartners, Doing Business under the Firm Name and Style of Delbruck, Schickler & Co., Defendants

BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolph Metz and Harry B. Lake and Anna Thalmann [fol. 2] and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, co-partners doing business under the firm name and style of Ladenburg, Thalmann & Co., doing business in the State of New York and Southern District of New York, at No. 25 Broad Street, Borough of Manhattan, City of New York, present this bill of complaint against Thomas Woodnutt Miller as Alien Property Custodian, Frank White as the Treasurer of the United States, and Carl Joerger, Gustaf Ratjen, Ludwig Körte, Arthur Freiherr von Schickler, Margarete Gräfin von Pourtales, Estate of Ludwig Delbrück, deceased, as co-partners doing business under the firm name and style of Delbrück, Schickler & Co., all citizens or subjects of Germany, and thereupon the plaintiffs complain and say:

1. On and for many years prior to the 26th day of February, 1912, the firm of Ladenburg, Thalmann & Co., was a firm of private bankers doing business in the Borough of Manhattan, City of New York, in the Southern District of New York, composed of the following: Ernst Thalmann, Benjamin Guinness, Walter T. Rosen and Moritz Rosenthal. On the 26th day of February, 1912, the aforesaid Ernst Thalmann died, and the representatives of his Estate became partners in said firm of Ladenburg, Thalmann & Co. pursuant to authority vested in them by the Will of the said Ernst Thalmann, and the said firm of Ladenburg, Thalmann & Co. has continued in existence as thus constituted, and has continued to do business as

a firm of private bankers in the Borough of Manhattan, City of New York, except that at various times since the said February 26th, [fol. 3] 1912, the following have been admitted to partnership in the said firm of Ladenburg, Thalmann & Co.; Sidney H. March, Rudolph Metz and Harry B. Lake, who are plaintiffs herein.

2. The defendant Thomas Woodnutt Miller is Alien Property Custodian and the defendant Frank White is Treasurer of the United States. The defendants Carl Joerger, Gustaf Ratjen, Ludwig Körte, Arthur Freiherr von Schickler, Margarete Gräfin von Pourtales, Estate of Ludwig Delbrück, deceased, co-partners, doing business under the firm name and style of Delbrück, Schickler & Co. (hereinafter jointly called "the defendant Delbrück, Schickler & Co.") are citizens or subjects of Germany and were subjects of the Empire of Germany for a long time prior to April 6th, 1917.

3. The grounds upon which the Court's jurisdiction depends are that this is a suit of civil nature in equity brought under the terms of Section 9 of an Act of Congress entitled "An Act to define, regulate and punish Trading With the Enemy, and for other purposes," approved October 6th, 1917, as amended.

4. That the firm of Ladenburg, Thalmann & Co. has heretofore duly filed with the said Alien Property Custodian a notice of its claim against the defendant Delbrück, Schickler & Co. under oath, and in such form and containing such particulars as the said Alien Property Custodian did pursuant to law require.

5. Upon information and belief, that property of the defendant Delbrück, Schickler & Co. has been conveyed, transferred, assigned, [fol. 4] delivered or paid to the defendant Alien Property Custodian, or seized by him pursuant to the terms of the aforesaid Act of Congress, and such property is held by him or by the defendant the Treasurer of the United States in the Southern District of New York in an amount greater than the amount of the claim of the said firm of Ladenburg, Thalmann & Co. so filed with the Alien Property Custodian, and in an amount greater than the amount sought to be recovered in this suit in equity.

6. For many years prior to April 6th, 1917, the defendant Delbrück, Schickler & Co. was engaged in transactions with the aforesaid firm of Ladenburg, Thalmann & Co.

7. That on April 6th, 1917, the defendant Delbrück, Schickler & Co. was indebted to the said firm of Ladenburg, Thalmann & Co. That the account between the aforesaid firm of Ladenburg, Thalmann & Co. and the said defendant Delbrück, Schickler & Co. was stated between the same on January 6th, 1920, as of January 1, 1916, at Marks 1,079.35, and thereafter there were no dealings between the aforesaid firm of Ladenburg, Thalmann & Co. and the said defendant Delbrück, Schickler & Co., as shown by the letter of the defendant Delbrück, Schickler & Co. dated January 6th, 1920, hereto annexed and marked Exhibit "A." That the said sum of Marks

1,079.35, converted into dollars at the pre-war rate of exchange, at the rate of 17½ cents per Mark, shows an indebtedness by the defendant Delbrück, Schickler & Co. of $188.89, and with interest at the rate of 1½% per annum, the rate of interest agreed upon between the aforesaid firm of Ladenburg, Thalmann & Co. and the said defendant Delbrück, Schickler & Co., there was owing by the [fol. 5] said defendant Delbrück, Schickler & Co. to the aforesaid firm of Ladenburg, Thalmann & Co. as of May 9th, 1919, the sum of $198.40. The date of May 9th, 1919, is selected, because the said account between the aforesaid firm of Ladenburg, Thalmann & Co. and the defendant Delbrück, Schickler & Co. was adjusted as of that date, together with numerous other accounts of the aforesaid firm of Ladenburg, Thalmann & Co. with alien enemies, between the aforesaid firm of Ladenburg, Thalmann & Co. and the Alien Property Custodian as the date as of which such accounts should be settled.

8. The aforesaid firm of Ladenburg, Thalmann & Co. concedes a separate indebtedness to the defendant Delbrück, Schickler & Co. of $35.35.

Wherefore, plaintiffs pray for judgment (1) that plaintiffs be granted a writ of subpœna to be directed to the said Thomas Woodnutt Miller as Alien Property Custodian, Frank White as Treasurer of the United States, and Delbrück, Schickler & Co., a citizen or subject of Germany, requiring them and each of them, at a certain time and under a certain penalty therein to be stated, personally to appear before this Honorable Court and, to then and there, full, true, direct and perfect answer to make to all and singular the premises, and further to do and perform all orders and decrees that shall be made herein. (2) Establish the interest and right of plaintiffs in the property held by the defendants Alien Property Custodian and Treasurer of the United States, and require them to pay to plaintiffs the sum of $163.05, the amount of the indebtedness of the de- [fol. 6] fendant Delbrück, Schickler & Co. to the plaintiffs. (3) That said Alien Property Custodian and Treasurer of the United States shall retain all property of Delbrück, Schickler & Co. until this suit is terminated. (4) That plaintiffs have such other and further relief as to the Court may seem just.

Van Vorst, Marshall & Smith, Solicitors and Counsel for Plaintiffs.

Office and Post Office Address, No. 25 Broad Street, Borough of Manhattan, New York City.

Jurat showing the foregoing was duly sworn to by Sidney H. March omitted in printing.

[fol. 7] EXHIBIT A TO BILL OF COMPLAINT

Delbrück, Schickler & Co.

Adresse für Depeschen: Delbruckbank Berlin, Kt.

Berlin, W. 66, den 6. Januar, 1920.

Herren, Ladenburg, Thalmann & Co., New York:

Wir empfingen Ihr Schreiben vom 4. Dezember 1919 und teilen Ihnen mit, dass Sie am 1. Januar 1916 in unseren Büchern ein Guthaben von M 1 079.35 hatten, seit diesem Tage war Ihr Konto umsatzlos; über den Ihnen zu kewahrenden Zinssatz wird später Entscheidung getroffen werden.

Delbruck, Schickler & Co.

[fol. 8] IN UNITED STATES DISTRICT COURT

SUBPŒNA

The President of the United States of America to Thomas Woodnutt Miller, as Alien Property Custodian, Frank White, as Treasurer of the United States, and Carl Joerger, Gustaf Ratjen, Ludwig Körte, Arthur Frieherr von Schickler, Margarete Gräfin von Pourtales, Estate of Ludwig Delbrück, deceased, co-partners, doing business under the firm name and style of Delbrück, Schickler & Co., defendants, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolph Metz and Harry B. Lake and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, deceased, co-partners doing business under the firm name and style of Ladenburg, Thalmann & Co., plaintiffs, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two hundred and fifty dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 5th day of December in the year One thousand nine hundred and twenty-one, and of the Independence [fol. 9] of the United States the one hundred and forty-sixth.

Van Vorst, Marshall & Smith, Plaintiffs' Solicitors. Alex. Gilchrist, Jr., Clerk.

The defendants are required to file their answer or other defense in the above cause in the Clerk's Office of this Court on or before the

twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, sepa-
[fol. 11] rately and severally moving to dismiss the bill of complaint and as grounds for their separate and several motions assign the following:

(1) It appears affirmatively from the allegations of the bill of complaint that the plaintiffs herein have not stated facts sufficient to constitute a ground for equitable relief under Section 9 of the Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder.

Wherefore, these defendants pray that they be dismissed with their costs in this behalf expended and for such other and further relief to which in the premises they may be entitled.

Wm. Hayward, United States Attorney, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS

A motion having been filed on behalf of the defendants, Thomas
[fol. 13] Woodnutt Miller as Alien Property Custodian, and Frank White as Treasurer of the United States to dismiss the bill of complaint, and said motion having been brought on for hearing on the 6th day of January, 1922, and having been argued, and due deliberation having been had,

Ordered, that said motion be, and the same hereby is denied.

J. W. Mack, United States Circuit Judge.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO THE BILL OF COMPLAINT

Now come the defendants Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States sepa-[fol. 15] rately and severally answering the bill of complaint and for their separate and several answers say:

(1) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered First of the bill of complaint, and therefore demand strict proof thereof;

(2) Answering the averments of paragraph numbered Second of the bill of complaint these defendants admit that Thomas W. Miller is Alien Property Custodian and Frank White is Treasurer of the United States. They have no knowledge or information sufficient to form a belief as to whether the defendants Carl Joerger, Gustaf Ratjen, Ludwig Korte, Arthur Freiherr von Schickler, Margaret Grafin von Pourtales, Estate of Ludwig Delbrück, deceased, co-partners, doing business under the firm name and style of Delbrück, Schickler & Co., are citizens or subjects of Germany and were subjects of the Empire of Germany for a long time prior to April 6, 1917, and therefore demand strict proof thereof;

(3) The averments of paragraph numbered Third of the bill of complaint are statements of law which these defendants are not required to answer;

(4) They admit the averments of paragraph numbered Fourth of the bill of complaint;

(5) Answering the averments of paragraph numbered Fifth of the bill of complaint these defendants say that the Alien Property Custodian, acting under and pursuant to the terms and provisions of [fol. 16] the Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder, after investigation determined that Delbruck & Company was an enemy within the purview and meaning of said act, the amendments thereto and the proclamations and executive orders issued thereunder and that certain money was owing to, and held for, on account of, and for the benefit of the plaintiff herein, and thereupon the Alien Property Custodian required that the said money and other property determined by him to be the property of said enemy, be conveyed, transferred, assigned, delivered and/or paid to him, to be by him held, administered and accounted for as provided by law. Thereafter the Alien Property Custodian acting pursuant to law, paid over to the Treasurer of the United States all of the said money to be by the said Treasurer held, administered and accounted for as provided by law.

And further answering said paragraph these defendants say that the determination of the enemy character of the said partnership and of the enemy ownership of the said property, finally for the purposes of this suit and the plaintiff herein must present strict proof as to the same and this Court must determine out of what if any of the money and other property now held by the Alien Property Custodian any claim which these plaintiffs may establish herein must be paid.

Further answering said paragraph these defendants say that at the hearing of this cause they will render unto this Court a full and exact accounting of all the said money and other property to the end that a just and equitable decree may be rendered herein;

(6) They have no knowledge or information sufficient to form a [fol. 17] belief with respect to the averments of paragraph numbered Sixth of the bill of complaint, and therefore demand strict proof thereof;

(7) Answering the averments of paragraph numbered Seventh of the bill of complaint, these defendants say that they have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered Seventh except in so far as the said paragraph alleges that the accounts of the plaintiff with the partnership Delbrück, Schickler & Co., were checked over between the plaintiffs and the Alien Property Custodian and adjusted as of May 9, 1919, and as to this averment these defendants say that accountants employed by the Alien Property Custodian by and with the consent of the defendants herein, audited the books used by the plaintiffs in the conduct of their business, in order to determine for the satisfaction of the Alien Property Custodian the state of the accounts of the plaintiffs' business with respect to enemy transactions, but that no agreement was ever entered into and no account was ever settled by and between the Alien Property Custodian and the plaintiffs herein.

And further answering said paragraph these defendants deny that the plaintiffs herein are entitled to have the amount of any debt owing to them in marks by said enemy defendants computed in United States money at the pre-war rate of exchange, on the contrary these defendants assert that any claim in marks which the plaintiffs may establish to be owing to them by the said enemy defendants, must be determined in United States money as of the date of any judgment or decree which the plaintiffs herein may secure.

[fol. 18] Further answering said paragraph these defendants deny that the plaintiffs herein are entitled to interest for the period beginning April 6, 1917, and ending July 2, 1921.

(8) They admit the averments of paragraph numbered Eighth of the bill of complaint.

Wherefore, these defendants having fully answer- the bill of complaint pray that they be dismissed with their costs in this behalf

expended and for such other and further relief to which in the premises they may be entitled.

Wm. Hayward, United States Attorney, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted.]

STATEMENT OF EVIDENCE

It is stipulated that the evidence at the trial given by Frederick Wille, Comptroller of the firm of Ladenburg, Thalmann & Co. established the following:

[fol. 20] 1. On and for many years prior to the 26th day of February, 1912, the firm of Ladenburg, Thalmann & Co. was a firm of private bankers doing business in the Borough of Manhattan, City of New York, in the Southern District of New York, composed of the following: Ernst Thalmann, Benjamin Guinness, Walter T. Rosen and Moritz Rosenthal. On the 26th day of February, 1912, the aforesaid Ernst Thalmann died, and the representatives of his Estate became partners in said firm of Ladenburg, Thalmann & Co., pursuant to authority vested in them by the Will of the said Ernst Thalmann, and the said firm of Ladenburg, Thalmann & Co. has continued in existence as thus constituted, and has continued to do business as a firm of private bankers in the Borough of Manhattan, City of New York, except that at various times since the said February 26th, 1912, the following have been admitted to partnership in the said firm of Ladenburg, Thalmann & Co.: Sidney H. March, Rudolf Metz and Harry B. Lake, who are plaintiffs herein.

2. The defendant Thomas Woodnutt Miller is Alien Property Custodian and the defendant Frank White is Treasurer of the United States. The defendants Carl Joeger, Gustaf Ratjen, Ludwig Körte, Arthur Freiherr von Schickler, Margarete Gräfin von Pourtales, Estate of Ludwig Delbrück, deceased, co-partners, doing business under the firm name and style of Delbrück, Schickler & Co. (hereinafter jointly called "the defendant Delbrück, Schickler & Co.") are citizens or subjects of Germany and were subjects of the Empire of Germany for a long time prior to April 6th, 1917.

[fol. 21] 3. That the firm of Ladenburg, Thalman & Co. heretofore duly filed with the said Alien Property Custodian a notice of its claim against the defendant Delbrück, Schickler & Co. under oath, and in such form and containing such particulars as the said Alien Property Custodian did pursuant to law require, and that therein, the said firm of Ladenburg, Thalmann & Co., claimed an indebtedness of Marks 1,079.35 as of January 1, 1916, converted into

dollars at the pre-war rate of exchange of 17½ cents per Mark, the said pre-war rate of exchange being the average rate of exchange prevailing for one month prior to April 6th, 1917, the date of the commencement of the war between the United States and Germany, and conceded a separate indebtedness to the defendant Delbrück, Schickler & Co. of $35.35.

4. For many years prior to April 6th, 1917, the defendant Delbrück, Schickler & Co. was engaged in transactions with the aforesaid firm of Ladenburg, Thalmann & Co.

5. That on April 6th, 1917, the defendant, Delbrück, Schickler & Co. was indebted to said firm of Ladenburg, Thalmann & Co. in the sum of Marks 1,079.35, as of January 1, 1916, as shown by an account stated, dated December 31, 1916, duly acknowledged by the defendant Delbrück, Schickler & Co., and thereafter there were no dealings between the aforesaid firm of Ladenburg, Thalmann & Co. and the said defendant Delbrück, Schickler & Co. The value of the mark on December 31, 1916, was 18¼ cents per mark. The aforesaid firm of Ladenburg, Thalmann & Co. conceded a separate indebtedness to the defendant, Delbrück, Schickler & Co. of $35.35. [fol. 22] The following facts were stipulated at the trial:

That property of the defendant Delbrück, Schickler & Co. has been conveyed, transferred, assigned, delivered or paid to the defendant Alien Property Custodian, or seized by him pursuant to the terms of the aforesaid Act of Congress, and such property is held by him or by the defendant the Treasurer of the United States in an amount greater than the amount of the claim of the said firm of Ladenburg, Thalmann & Co. so filed with the Alien Property Custodian, and in an amount greater than the amount sought to be recovered in this suit in equity.

6. It was further stipulated that valuing the Mark at the rate of exchange of 17½ cents per Mark, the claim of the plaintiffs against Delbrück, Schickler & Co. was an amount as shown in the following table depending on the dates within which interest should be calculated:

	Claim as of April 6th, 1917	With interest from April 6, 1917, to May 23, 1923	With interest from July 14, 1919, to May 23, 1923	With interest from July 3, 1921, to May 23, 1923
Delbrück, Schickler & Co.—				
Marks, 1,098.48, at 17½	$192.23	.....	.....	.....
Offset	43.95	.....	.....	.....
Net	$148.28	$203.60	$183.10	$163.31

7. It was further stipulated that at the date of the trial May 23, [fol. 23] 1923, the value of the Mark was 2/1000 of a cent, and it is stipulated that on July 17, 1923, the date of the decree, the value

of the Mark was 1/25000 of one cent, and it is stipulated that the decree was made and judgment was entered for the payment of a sum based on a valuation of the mark at 17½ cents per mark.

Wm. Hayward, United States Attorney for the Southern District of New York, Solicitor for Thomas Woodnutt Miller, as Alien Property Custodian, and Frank White, as Treasurer. Van Vorst, Marshall & Smith, Solicitors for Benjamin Guinness et al.

[fol. 24] In United States District Court, Southern District of New York

E. 22-296

Benjamin Guinness et al., Copartners, Doing Business under the Firm Name and Style of Ladenburg, Thalmann & Co., Plaintiffs,

against

Thomas Woodnutt Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, and Siegfried Pels and Albert Pels, as Copartners, Doing Business under the Firm Name and Style of Ludwig Nauen, German Citizens or Subjects, Defendants,

And Six Other Cases

Opinion—June 23, 1923

Learned Hand, D. J.:

Nobody questions that between April 6, 1917, and July 14, 1919, it was not lawful for an American to hold communication with a German, or for a German to communicate with an American. It is clear, therefore, that the creditors could not have received interest or the debtors have paid it. This is as true whether the Americans were debtors or creditors. It is, of course, obvious that this fact does not affect the profits of the debtor, who has had and enjoyed [fol. 25] the money meanwhile, or the damage of the creditor who has been without it. If the case were res integra it might be asked whether the inability of the debtor to pay was an adequate reason for changing the normal relations of the parties, especially if interest were payable secundum tenorem.

However, it was expressly ruled in Brown vs. Hiatts, 15 Wall., 177, that a Kansan need not pay a Virginian interest reserved in a mortgage for the period of the Civil War, on the ground that while communication was interrupted it was impossible for him to pay. That case stands unmodified and must be taken as the rule till the Supreme Court changes it. This is especially true now, since the Trading with the Enemy Act was enacted after careful preparation, and, in accordance with the usual presumption, must be understood

as adopting the decisions laid down in pari materia unless changed. I do not feel justified therefore in undertaking any independent inquiry on the subject.

The plaintiffs do indeed seek to distinguish, because here the debts were due before war broke out, while in Brown vs. Hiatts, supra, the debt fell due after April 27, 1861, when the blockade became effective. This is however of not the slightest moment, since in either case those considerations apply which were the basis of the rule. It is as little possible for the debtor to pay after war breaks out in one case as the other. Interest runs de die in diem and is due only for the delay in payment during the period in which it accrues. The fact that it once starts running cannot affect the debtor's inability to pay during the interdiction.

Nor does it make a difference whether the enemy have funds capable of attachment. He can hardly be charged with interest [fol. 26] because the creditor has not chosen to seize his goods. The reason for the rule is the supposed injustice of penalizing a debtor because he has not done an impossibility, and it applies quite as much whether or not his property was subject to proceedings in rem. Payment lay with the creditor, not him. Hence the rule must work either way.

An entirely different situation was presented in Robertson vs. Miller, 286 Fed. R., 503 (C. C. A., 2), which apparently recognized the rule in Brown vs. Hiatts, supra, though the case was not cited. There the enemy had property within the United States in the hands of an agent who had full power to act for him. This was taken to avoid the rule, because it was not unlawful for that agent to pay and the enemy was charged with his neglect.

The period of cesser will however not extend beyond July 14, 1919, when payments became lawful.

Settle decrees in accordance with the foregoing.

L. H., D. J.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—June 28, 1923

LEARNED HAND, D. J.: This is a suit under Section Nine of the Trading with the Enemy Act by a citizen to recover a debt owed by a German on a stated account payable in marks. The sole question is whether the decree should be for the value in dollars of the marks when the account was stated, December 16, 1917, or for their value as of the date of the decree.

In the case of a tort committed in a foreign juridiction it is pretty clear that the judgment should be based on the exchange at the time [fol. 28] of the loss inflicted. In such cases we are familiar with the idea that his wrong imposes on the tort-feasor an obligation to indemnify his victim in money. A court of the sovereign where the

tort occurs enforces this obligation in the money of that sovereign regardless of its change in value, merely because those are the terms in which it is cast. When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. And if this were true, it would seem to follow that the obligation should be discharged in the money of the sovereign in whose territory the tort occurred, and that the proper rule would be to adopt the rate of exchange as of the time of the judgment.

However, no court can enforce any law but that of its own sovereign, and when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs. But, since, apart, from specific performance, such an obligation must be discharged in the money of that sovereign, none other being available, the obligation so created can only be measured in that medium. The form of the obligation must therefore be to indemnify the victim for his loss in terms of the money of the foreign sovereign, and that obligation necessarily speaks as of the time when it arose, that is, when the loss occurred. Hence, a foreign court is as little concerned with the changes in the value of money in the territory where the tort arose, as are the courts of that territory itself. Each court is enforcing a different obligation, [fol. 29] imposed by different sovereigns, necessarily defined in the terms of its own money.

In case of torts this has been generally recognized as the proper result, The Verdi, 268 Fed. R., 908, The Celia (1921), 2 App. Cas., 344. The same considerations obviously apply to the breach of a contract resulting in unliquidated damages, at least if the resulting obligation to indemnify the promisee be regarded as imposed by law, and not as an alternative performance. And even if the second notion be accepted, the alternative performance is not to pay a fixed sum, but generally to indemnify the promisee. Such a case was The Saigon Maru, 267 Fed. R., 881, 893, where, however, exchange was fixed as of the date of the decree, a case with which I cannot go along.

The chief differences in the decisions arise in cases of contract to pay a fixed sum of money. Thus the same judge who decided The Verdi, supra, held in The Hurona, 268 Fed. R., 910, that in that case exchange should be taken as of the time of the decree. Some of the earlier cases are in accord, but the contrary was held in Page vs. Levenson, 281 Fed. R., 555, Hoppe vs. Russo-Asiatic, 235 N. Y. 37, Société etc. vs. Cumming, (1921) 3 K. B., 459. Birge-Forbes Co. vs. Heye, 251 U. S. 317, seems in fact to have involved the point, but can [fol. 30] scarcely be considered as an authority, at least in the Supreme Court.

There is in my judgment no sound basis for distinction between torts and contracts to pay fixed sums of money. The confusion arises from the assumption that payment after the due date is performance. But that appears to be untrue. A promise to pay a sum at a given day is not a promise to pay then or later. When the promisor de-

faults he fails to perform the only promise he has made, and his liability is as much a new creation of the law, as though he had failed to deliver a chattel. Or if it be insisted that his liability is an alternative performance, still that performance is not to pay at any later time, but generally to indemnify the promisee, subject of course to the limitations imposed by law. That liability is, as it seems to me, quite analogous to the obligation to indemnify raised upon a tort and the same reasoning should apply to it. A foreign sovereign will raise an equivalent obligation but couched in terms of its own money, because that alone it has the power to secure.

A different rule it is true might be applicable if specific performance were possible in such cases. No doubt a sovereign might insist upon the delivery of foreign money, if the occasion were proper. On obligations to pay money, this remedy does not, however, lie. All that can be done is to seize the promisor's property and sell it, a procedure which can result only in domestic money. To take the exchange as of the period of the judgment or decree is, therefore, to adopt a rule applicable only to specific performance, in a case where specific performance is not exacted. Since the loss is to be indemnified in the money of the sovereign where the Court sits, it has no alternative but to calculate it in terms of that money when the loss occurred, and to enforce its judgment regardless of variations in its [fol. 31] value between that time and the date of collection.

It must be confessed that the law is as yet not settled in the Federal Courts, but whatever be the true analysis, the indications are that the English and New York rule will eventually prevail. As this seems to me to accord with principle I shall adopt it till it is settled otherwise. In the case at bar, therefore, the proper exchange was that at the time when the account was stated and the balance became immediately payable.

Settle decree on notice.

L. H. D. J.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE—July 17, 1923

This cause came on to be heard at this Term, and was argued by counsel; and thereupon, and upon consideration thereof, it was

[fol. 33] Ordered, adjudged and decreed as follows, viz:

That the defendant Alien Property Custodian and defendant Treasurer of the United States pay to plaintiffs the sum of One hundred eighty-three dollars and ten cents ($183.10) with interest from May 23, 1923, together with the costs of this suit, out of property of the defendant alien enemies conveyed, transferred, assigned, delivered or paid to or seized by the defendant Alien Property Custodian or any of his predecessors in office, and held by the defendant Alien

Property Custodian or by the defendant Treasurer of the United States in a trust entitled Delbrück, Schickler & Co.

Learned Hand, United States District Judge.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—DEFENDANTS BELOW

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, and file the following assignment of errors upon which they will reply upon their appeal from the decree made by this honorable Court on the 17th day of July, 1923, in the above entitled cause.

First. That the Court erred in overruling the motion to dismiss the bill of complaint.

[fol. 35] Second. That the Court erred in not sustaining the motion to dismiss the bill of complaint.

Third. That the Court erred in holding that the decree in this cause should be for the value in dollars of the marks owing to the plaintiff when the account between the plaintiff and Delbrück, Schickler & Company was stated on December 16, 1917.

Fourth. That the Court erred in not holding that the decree should be for the value in dollars as of the date of the decree, of the German marks to the plaintiffs.

Fifth. That the Court erred in holding that since the loss to the plaintiffs is to be indemnified in the money of the sovereign where the Court sits, the Court has no alternative but to calculate it in terms of that money when the loss occurred, and to enforce its judgment regardless of variation in its value between that time and the date of collection.

Sixth. That the Court erred in ordering, adjudging, and decreeing that the defendants, the Alien Property Custodian and the Treasurer of the United States pay to the plaintiffs the sum of one hundred eighty-three dollars and ten cents ($183.10), with interest from May 23, 1923, together with costs of this suit out of the property of the defendant alien enemies, conveyed, transferred, assigned, delivered, or paid to or seized by the Alien Property Custodian or any of his predecessors in office, and held by the defendant, the Alien Property Custodian, or by the defendant, the Treasurer of the United States, in a trust entitled Delbrück Schickler & Company.

[fol. 36] Seventh. That the Court erred in not adjudging, ordering and decreeing that the bill of complaint be dismissed.

All of which is respectfully submitted.

Dated New York, New York, the 6th day of September, 1923.

Wm. Hayward, United States Attorney, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

[fol. 37] IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

ASSIGNMENTS OF ERROR—PLAINTIFFS BELOW

Now come the plaintiffs, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake, [fol. 38] and Paul Stamm and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co. and file the following assignment of errors upon which they will rely upon their appeal from the decree made by this Honorable Court on the 17th day of July, 1923, in the above entitled cause.

First. That the Court erred in holding that plaintiffs were not entitled to interest upon the principal of their claim from April 6, 1917, to July 14, 1919.

Second. That the Court erred in ordering, adjudging and decreeing that the defendants, the Alien Property Custodian and the Treasurer of the United States, pay to the plaintiffs the sum of One hundred eighty-three dollars and ten cents ($183.10) with interest from May 23, 1923, in lieu of the sum of Two hundred and three dollars and sixty-cents ($203.60) with interest from May 23, 1923, together with costs of this suit out of the property of the defendants, alien enemies, conveyed, transferred, assigned, delivered or paid to or seized by the Alien Property Custodian or any of his predecessors in office, and held by the defendant the Alien Property Custodian or by the defendant, the Treasurer of the United States in a trust entitled Dulbrück, Schickler & Co., all of which is respectfully submitted.

Dated, New York, N. Y., this 30th day of September, 1923.

Van Vorst, Marshall & Smith, Solicitors for Benjamin Guinness et al., Plaintiffs.

[fol. 39] IN UNITED STATES DISTRICT COURT

Eq., 22308

[Title omitted]

NOTICE OF APPEAL—DEFENDANTS BELOW

To the Clerk of the United States District Court for the Southern District of New York; Messrs. Van Vorst, Marshall & Smith, 25 Broad Street, Borough of Manhattan, New York, Solicitors for Plaintiffs:

Please take notice that Thomas W. Miller, as Alien Property Cus-[fol. 40] todian and Frank White, as Treasurer of the United States of America, do hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final decree made and entered on the 17th day of July, 1923, and from each and every part of said decree.

Dated New York, New York, Sept. 6, 1923.

Wm. Hayward, United States Attorney for the Southern District of New York, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

[fol. 41] IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

NOTICE OF APPEAL—PLAINTIFFS BELOW

To the Clerk of the United States District Court for the Southern District of New York; Hon. William Hayward, United States [fol. 42] Attorney for the Southern District of New York, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States:

Please take notice that Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake and Paul Stamm, and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co., do hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final decree made and entered on the 17th day of July, 1923 in so far as the same adjudges that the defendants shall pay to the plaintiffs the sum of One hundred eighty-three dollars and ten cents ($183.10) with interest from May 23,

1923, as therein provided, instead of the sum of Two hundred and three dollars and sixty cents ($203.60), the latter sum including interest from April 6, 1917 to July 14, 1919, which interest is not included in the sum of One hundred eighty-three dollars and ten cents ($183.10).

Dated, New York, N. Y., September 30, 1923.

Van Vorst, Marshall & Smith, Solicitors for Benjamin Guinness et al.

[fol. 43] IN UNITED STATES DISTRICT COURT

Eq. 22308

[Title omitted]

PETITION FOR APPEAL OF DEFENDANTS BELOW

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, by their solicitor William Hayward, Esquire, United States Attorney for the Southern District of New York, and conceiving themselves aggrieved by the decree made and entered on the 17th day of July, 1923, in the above entitled cause, do hereby appeal from the said [fol. 44] order and decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors which is filed herewith and they pray that this appeal may be allowed and that a citation be issued as provided by law and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Wm. Hayward, United States Attorney for the Southern District of New York, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

Dated New York, September 6, 1923.

[fol. 45] IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

PETITION FOR APPEAL OF PLAINTIFFS BELOW

Now come the plaintiffs, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake

[fol. 46] and Paul Stamm and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co. by their solicitors, Van Vorst, Marshall & Smith and conceiving themselves aggrieved by the decree made and entered on the 17th day of July, 1923 in the above entitled cause, do *hereby appeal from the said order and* decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed, and that a citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order and decree were made duly authenticated may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., September 30, 1923.

Van Vorst, Marshall & Smith, Solicitors for Plaintiffs.

[fol. 47] IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

ORDER ALLOWING APPEAL OF DEFENDANTS BELOW

Upon reading the petition of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, dated New York, New York, September 6, 1923, for the allowance of an appeal, and on consideration of the Assignment of Errors presented therewith, is

Ordered that the appeal as prayed for be and the same is hereby [fol. 48] allowed and that a certified copy of the record and of proceedings be forthwith transmitted to the Circuit Court of Appeals for the Second Circuit; and it appearing that this appeal is taken by direction of a department of the Government, to wit, the Department of Justice, it is further

Ordered that the said appeal shall operate as a supersedeas and that no bond, obligation or security shall be required from the appellants, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, either to prosecute the same or to answer in damages and costs.

Dated New York, New York, September 6, 1923.

Manton, United States Circuit Judge.

[fol. 49] IN UNITED STATES DISTRICT COURT

Equity, 22308

[Title omitted]

ORDER ALLOWING APPEAL OF PLAINTIFFS BELOW

Upon reading the petition of Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake [fol. 50] and Paul Stamm and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co. dated New York, N. Y., September 30, 1923 for the allowance of an appeal, and on consideration of the assignment of errors presented therewith, it is

Ordered that the appeal as prayed for be, and the same hereby is allowed, and that a certified copy of the record and all proceedings be forthwith transmitted to the Circuit Court of Appeals for the Second Circuit, and upon the subjoined consent, it is

Further ordered that no bond, application, or security shall be required from the appellants, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake and Paul Stamm, and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg Thalmann & Co. either to prosecute the same or to answer in damages and costs.

Dated New York, N. Y., October 5, 1923.

Hand, United States District Judge.

[fol. 51] Thomas W. Miller, as Alien Property Custodian, and Frank White as Treasurer of the United States hereby consent to the entry of the foregoing order, and consent that no bond, application or security shall be required from the appellants, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolf Metz, Harry B. Lake and Paul Stamm, and Anna Thalmann and Moritz Rosenthal as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm name and style of Ladenburg, Thalmann & Co. either to prosecute the appeal or to answer in damages and costs.

Wm. Hayward, United States Attorney for the Southern District of New York, Solicitor for Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

[fol. 52] CITATION—In usual form; omitted in printing.

[fols. 53 & 54] CITATION—In usual form; omitted in printing.

[fol. 55] IN UNITED STATES DISTRICT COURT

Eq., 22308

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true [fol 56] transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated November 14th, 1923.

Van Vorst, Marshall & Smith, Solicitors for Complainant.
Wm. Hayward, United States Attorney, Solicitor for Defendants Miller and White.

[fol. 57] IN UNITED STATES DISTRICT COURT

Eq. 22-308

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do [fol. 58] hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 15th day of November in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk.

[fol. 59] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1923

Argued February 14, 1924. Decided April 14, 1924

No. 236

BENJAMIN GUINESS, WALTER T. ROSEN, MORITZ ROSENTHAL, SIDNEY H. March, Rudolph Metz and Harry B. Lake, and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, Deceased, Copartners, Doing Business under the Firm Name and Style of Ladenburg, Thalmann & Company, Plaintiffs-Appellants and Appellees,

v.

THOMAS W. MILLER, as Alien Property Custodian; FRANK WHITE, as Treasurer of the United States, and Carl Joerger, Gustaf Ratjen, Ludwig Korte, Arthur Freiherr von Schickler, Margarete Grafin von Pourtales, Estate of Ludwig Delbruck, Deceased, Copartners, Doing Business under the Firm Name and Style of Delbruck, Schickler & Company, Defendants-Appellants and Appellees.

Appeal from the District Court of the United States for the Southern District of New York

Before Rogers, Manton, and Mayer, Circuit Judges

[fol. 60] Appeal from a decree of the United States District Court for the Southern District of New York, ordering the Alien Property Custodian and the Treasurer of the United States to pay out of funds seized, a sum of money in payment of a debt of an alien. Both plaintiffs and defendants appeal.

Van Vorst, Siegel & Smith, Esqs., Solicitors for Plaintiffs. Alexander B. Siegel, Esq., of Counsel.

William Hayward, Esq., United States Attorney.

Dean Hull Stanley, Esq., A. R. Johnson, Jr., Esq., Special Assistants, Counsel for Defendants.

OPINION

MANTON, Circuit Judge:

This suit is instituted under §9 of the Trading with the Enemy Act (40 Stat., 411), as amended, to recover from the Alien Property Custodian or the Treasurer of the United States, the property of Delbruck, Schickler & Company for an indebtedness admitted to be due on an account stated as of December 31, 1916. On April 6, 1917, Delbruck, Schickler & Company were indebted to the plaintiffs in the sum of 1,079.35 marks as of January 1, 1916, and this was acknowledged by that firm when the account was stated December

31, 1916. Thereafter, there were no dealings between the parties. It is conceded that there was a separate indebtedness due to the defendant Delbruck, Schickler & Company of $35.35. Section 9 of the Trading with the Enemy Act authorizes the present proceeding.

The only questions presented here are law questions, since the facts have been stipulated. They are, (1) What rate of exchange should the court adopt in calculating the amount of the defendants' indebted- [fol. 61] ness in marks into money of the United States? (2) Was the plaintiff entitled to interest upon the indebtedness owing by Delbruck, Schickler & Company during the war period between April 6, 1917, and July 14, 1919—that is, from the date of the entry of the United States into the world war to the date of the issuance of the general license by the War Trade Board permitting communication and commercial transactions between citizens of the United States and citizens of Germany? The plaintiffs contend the rate of exchange to be that which existed on the date of the account stated—the date of the breach of contract—whereas the defendants contend for the date as of the date of the entry of the final decree. It is stipulated that on December 31, 1916, the value of the mark was 17½c. U. S. currency, and on the date of the decree, it was one-twenty-five thousandths of a cent. The Trading with the Enemy Act provides:

"Section 9 (a) That any person not an enemy or ally of enemy * * * to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said Custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled; * * * If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed [fol. 62] the notice as above required, and shall have made no application to the President, said claimant may at any time, before the expiration of thirty months after the end of the war institute a suit in equity * * * to establish the * * * debt so claimed, and if so established, the Court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the Court shall determine said claimant is entitled; * * *

(c) * * * nor in any event shall a debt be allowed under this Section unless it was owing to and owned by the claimant prior to October 6, 1917."

It is a pre-war debt that can be recovered under the Act, and that debt must necessarily be measured in dollars. Marks could not be

paid by the Alien Property Custodian, either on order of the President or of the court. The statute must be read in the light of coexisting and collateral provisions of law and in the absence of any statute law or common law requiring a different conclusion, the correct inference from the provisions of the Trading with the Enemy Act is that the value of pre-war debts recoverable under the Act is to be taken as of their pre-war value. Any other conclusion would cause confusion and a lack of uniformity in the application of its provisions. It would distort the statute under which the suit is brought, to hold that the amount of the debt recoverable thereunder was available depending upon the date of judgment. Such a construction would nullify that portion of the statute which permits the President to order the payment of the debt without a judgment.

In Birge-Forbes Co. v. Heye, 248 Fed., 636, aff'd 251 U. S., 317, a contention was presented as to whether the mark should be com- [fol. 63] puted at its normal value or at the value which it had at the time of the trial and the court said that the purpose of the judgment was to make the plaintiff pay for the amount which he paid out in discharging the obligations of his principals, and held that the evidence failing to disclose any depreciation of the German mark at the time of this payment, the assumption should be that the value of the mark was at that time the normal value and that the judgment should be predicated upon such value. The Supreme Court affirmed this conclusion. The rate of exchange on the date of the inquiry or breach of contract is the measure for transferring the indebtedness into the United States currency. This principle met with the approval of the Circuit Court of Appeals for the Fifth Circuit in Wormser Bros. v. G. Marroquin & Co. (249 Fed., 428), and of Judge Rose in Page v. Levenson (281 Fed., 555); and of the highest court of the State of New York in Hoppe v. Russo-Asiatic Bank (235 N. Y., 37); in Illinois, in Simonoff v. Granite City National Bank (279 Ill., 248); in New Jersey, in Katcher v. American Express Co. (94 N. J. L., 165). The House of Lords of England has reached the same conclusion. See S. S. Celia v. S. S. Vulturno (1921), 2 A. C., 544; British-American Continental Bank, Ltd., in re Goldzieher and Penso's claim (1922), 2 Ch., 575, and Uliendahl v. Pankhurst Wright & Co., K. B. Div., July 6, 1923, 39 Times L. R., 628. We regard this rule as applicable whether the action be in contract or in tort. Primarily the plaintiff is entitled to recover a sum expressed in foreign money. In theory, he is to be made whole for the injury suffered at the time. The judgment which grants him the relief should express in our currency the rate of exchange prevailing at the date of the breach of the contract or at the date of the commission of the tort. We see no sound reason for a different rule to be applicable, in the administration of justice to an injured claimant, when his right of recovery is through an action in tort rather than in a case [fol. 64] of contract. Such is the rule announced in the authorities above referred to.

We are referred to various provisions of the Treaty of Versailles and the Treaty of Peace with Germany proclaimed November 14,

1921, as bearing on this subject, but we are of the opinion that the specific provisions of the rate of exchange in the Treaty of Versailles and the reference to that treaty in the separate treaty of peace between Germany and the United States, do not detract from the conclusions reached above. It is the contention of the claimants that subdiv. 14 of the Annex to Section IV of Part X of the Treaty of Versailles, which is included in the treaty between the United States and Germany, makes provision for the rate of exchange and the rate of interest which is to be used in settling claims such as the plaintiffs' in this action. It provides:

"The provisions of Article 297 and this Annex, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment.

In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied."

[fol. 65] The United States has not made a declaration adopting Section III. It has given no notice rejecting the provisions of Section III respecting the currency in which payments of debts are to be made, and the rate of exchange and the rate of interest. The specific provisions as to the rate of exchange in the Treaty of Versailles are to be found in subdiv. D of Article 296. This is a part of Section III. Article 296 makes provision for the settlement of debts payable before the war and due by a national of one of the contracting parties residing within its territory, to a national of an opposite power residing within its territory. The provision makes for the payment and collection of such debts through a clearing house which is established. The rate of exchange provided is that rate which is fixed in the settlement of debts in such clearing house. Article 295 does not apply as between Germany on the one hand and any of the alien or associated powers unless within a period of one month from the deposit of the ratification of the present treaty, a notice to that effect is given to Germany by the government of the power adopting the provisions. It is conceded no such notice was ever given to Germany by the United States that it adopted the provisions of Article 296. Therefore we see no reason why the provisions of Article 296 apply to the United States as no debts existing between the nationals of the United States and the nationals of Germany are settled by the Clearing House. Subdivision 3 of the Annex to Article 296, makes provision that the parties to the clearing

house arrangement will prohibit within their territory, all legal process relating to the payment of enemy debts except in accordance with the provisions of the Annex. It is not contended here that Article 296 is binding upon the United States. It is said that subdiv. 14 to Section IV of Part X makes provision as to the rate of exchange to be used and interest to be allowed upon the claims other than those provided for in the Clearing House. There is a specific reference in [fol. 66] subdiv. 14 that

"The provisions of Article 297 and this Annex, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits and accounts, Section III regulating only the method of payment."

Article 297 has no reference to payment of debts of Germans due an American. In part of Section IV of Article 297 which is headed "Property Rights and Interest," provision is made for dealing with and liquidation of property belonging to nationals of allied and associated powers who were in Germany during the war or property of Germans which was within the territory of the allied and associated powers during the war. It is true that subdiv. 14 of the Annex to Section IV includes debts, credits and accounts, but that is a provision under Article 297 which does not deal with the payment of debts between nationals of various powers, shall include within its scope not only tangible property within the various countries, but also intangible. Credits are made property within the meaning of Article 297 between Germany and the associated states and between their respective nationals. The provision of Section III respecting currency in which payment is to be made and the rate of exchange and interest shall apply unless the governments of the allied and associated powers concerned shall, within six months of the coming into force of the present treaty, notify Germany that such provisions are not to be applied. Subdiv. 14 provides that on the settlement of matters provided for in Article 297, the provisions as to the rate of exchange and interest provided for in Section III shall apply. And Article 297 provides for the liquidation by the allied and associated powers, of all property rights and interest belonging, at the time of the coming into force, of the present treaty to German nationals and companies controlled by them within the territories of the allied and [fol. 67] associated powers. Thus, the provisions as to the rate of interest and exchange provided for in Section III are made applicable to Article 297 by subdiv. 14 of the Annex to Section IV, namely, in the instance of the liquidation of properties of Germans within the United States. Subdiv. E of Article 297 provides that nationals of the allied and associated powers shall be entitled to compensation with respect to damage or injury inflicted upon their property rights or interests including any company or association in which they are interested in German territory as it existed on August 1, 1914. This is another instance where the rate of exchange and interest applied, namely, where Germany liquidates the property of American nationals where the property was in Germany as of August 1, 1914,

Germany must use the rate of exchange and interest provided for in Section III. We regard these provisions of Article 297 as having no application to a suit under Section 9 of the Trading with the Enemy Act when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. The rate of exchange is in no way provided for if such procedure is instituted under Article 297 of the Treaty of Versailles.

The treaty of peace with Germany of which ratifications were exchanged on November 11, 1921, contains the following:

"Article I. Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

[fol. 68] Article II. With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions."

By a reservation, Congress on October 18, 1921, as a part of the Resolution of Ratification of the German Treaty, provided that,

"the rights and advantages which the United States is entitled to have and enjoy under this Treaty embraced the rights and advantages of nationals of the United States specified in the Joint Resolution or in the provisions of the Treaty of Versailles, to which this treaty refers."

Thus all the rights and advantages stipulated in the Versailles Treaty in Part X are reserved to the United States and under the Resolution of Ratification, to its nationals. If anything, the Treaty of Versailles entitled citizens of every allied or associated power which ratified to have pre-war debts owing to them by German nationals, paid at the pre-war rate of exchange. The provisions of the treaty had no application to the questions of either rate of exchange or interest.

The plaintiff is not entitled to recover interest upon this debt from the period of April 6, 1917, to July 14, 1919. During this period [fol. 69] there was a state of war between Germany and the United States. There was a suspension of interest upon obligations existing between citizens of hostile belligerent countries under the well recognized rules of law. At common law, interest is suspended during the period of war (Brown v. Hiatts, 82 U. S. 177). The reason has often been stated. It is that communications between citizens of hostile belligerents have become illegal and it becomes legally impossible for the debtor to pay his debt or the creditor to receive it. Interest is the charge for the withholding of payment of a debt and it would be inequitable to make the charge when it is legally impossible to pay the debt. This debt was ascertained and agreed upon. It was not paid because payment was impossible during the period of the war. There is no provision in the Trading with the Enemy Act which materially changes this rule of law. And by Section 7 (c) of the Trading with the Enemy Act, the President may require the payment to him of the debt owing to the enemy. In such an event, whether or not the debt of the enemy may be paid from the funds in the hands of the Alien Property Custodian depends upon the eventuality that the President shall so require. Under Section 7 (d) a debtor is permitted to pay his debt to the Alien Property Custodian only, but this must be with the consent of the President. Thus, it appears that there is not an unrestricted privilege to pay a debt. It may not be paid in any event even if the debtor may so desire. In order to overcome this rule, it must appear that there was an unrestricted ability on the part of the enemy to discharge his debt. Such was the case against the Alien Property Custodian in Robertson v. Miller (286 Fed., 503). There this court held that interest ran because the enemy had an agent in this country who was in possession of funds and had authority to pay the debts during the period of the war.

We find no error in the conclusion below. Decree affirmed.

[fols. 70 & 71] In United States Circuit Court of Appeals

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

Judgment—April 21, 1924

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

H. W. R.
M. T. M.
J. M. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioners, Benjamin Guinness, Walter T. Rosen, Moritz Rosenthal, Sidney H. March, Rudolph Metz and Harry B. Lake and Anna Thalmann and Moritz Rosenthal, as Trustees of the Estate of Ernst Thalmann, deceased, copartners doing business under the firm [fol. 73] name and style of Ladenburg, Thalmann & Company, the plaintiffs-appellants and appellees upon the appeal in the cause above-entitled humbly petition for a rehearing upon the said appeal and for cause show:

I

Sections of Article 297 of the Versailles Treaty, not adverted to by the Court in its Opinion, specifically deal with claims made upon enemy property seized by the Alien Property Custodian.

In the Opinion of the Court, after a discussion of the effect of the Treaty between the United States and Germany appears the following:

"We regard these provisions of Article 297 as having no application to a suit under Section 9 of the Trading with the Enemy Act when the purpose of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States where the property has been seized by the Alien Property Custodian and now held by the Treasurer of the United States. The rate of exchange is in no way provided for if such procedure is instituted under Article 297 of the Treaty of Versailles."

In opposition to this view we refer to the following provisions of Article 297 and the Annex thereto, which are not referred to in the Opinion of the Court, and which were not brought to the attention of the Court with sufficient definiteness by counsel upon either side. There are underlined, in lieu of extended argument, the portions of the sentences quoted which seem to us to be directly contrary to the conclusion reached by the Court.

Subdivision (2) of paragraph (h) of Article 297 provides as fol-[fol. 74] lows (the omitted portion, dealing with the obligation of Germany to restore property to the owners thereof):

"(2) As regards Powers not adopting Section III and the Annex thereto, * * * the proceeds of the property, rights and inter-

ests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto."

Paragraph 4 of the Annex to Article 297 is as follows:

"All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims" (and this obviously refers to the "claims" for damages last above referred to) "may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI."

Subdivision 14 of the Annex, fixing the rate of exchange and of interest, to which the Court refers, does indeed affect only those cases which are covered by Article 297 and the Annex thereto; but Article 297 does specifically cover the payment of claims made by a national [fol. 75] of an Allied or Associated Power against a national of Germany out of funds seized by the Government of an Allied or Associated Power which has failed to adopt Section III, and has thus failed to submit the seized property to the action of the International Clearing Office.

It is not our contention that the Treaty affects the rights existing between Germans and Americans in respect of prewar debts except to the extent that these rights are asserted against German property seized by the Alien Property Custodian; as to those rights we think that the Treaty clearly affects them, and would clearly be enforced in respect of them if the Versailles Treaty had been ratified by the Senate of the United States, and although that Treaty has not been ratified as a whole, these particular provisions have been incorporated into the law of the land by the express terms of the separate Treaty of Peace quoted in the Court's opinion.

We should all remember, in construing the Versailles Treaty, that the United States is named as a party thereto; that its Commissioners, headed by the President, had a guiding part in framing its provisions; and that nothing was further from the minds of either our Commissioners or of those of any other allied or associated Power than that the Treaty would not be ratified by the Senate.

Its provisions were, therefore, drafted to have effect and intended to have effect in the United States.

It is very recent history that account was taken of the Ameri
desire that property seized by our Government should not be thre
into the international pool provided in Section III of Part X,
that Germany was made, therefore, to recognize the right of
United States Government to retain the private property of its
tionals which had been seized, and the right to have the same s
jected to the payment of the debts owing by its citizens to ours;
[fol. 76] this was done by Section IV, which covers the case
countries which do not elect to join the international pool, and t
Section, in Article 297 and its Annex, specifically provides for w
our citizens may be entitled to receive out of such seized funds
that no German could object thereto.

In construing this Treaty, it is respectfully submitted that it n
be construed as if it had been ratified by the Senate, because
is what was in the minds of the parties when they drafted it. If it
been so ratified, and if it were now the law of the land, could there
any question, in view of the provisions therefrom which we h
quoted, that it applied to this case?

The Versailles Treaty never became the law of the land throu
its own ratification; but, as appears from the opinion of the Co
Section 297 of the Versailles Treaty, through its incorporation
reference in the separate Treaty of Peace, and through the te
of the Senate's resolution of ratification, has become and now i
part of the law of the land.

II

The careful opinion of the Court, by not referring to the ab
strictly relevant provisions, indicates that they were not within
scope of its attention.

The Court's attention was not specifically drawn to these secti
by counsel for the plaintiffs-appellants and appellees because the G
ernment's position in respect of the Treaty was not fully apprecia
by them, that position having been stated in a supplemental me
randum submitted by the Government ten days after the argum
The Government did, however, quote these particular provisions
laid no stress thereon, and it is believed that they have been o
[fol. 77] looked by the Court, since in the Court's carefully wor
out opinion, no reference to these particular provisions, which s
to us to be the all important ones, has been made.

III

Of course, if these contentions be correct, then interest will be
lowed during the period of the war in an action brought under S
tion 9 of the Trading with the Enemy Act, although the Tre
does not otherwise affect the rights existing between Germans a
Americans; because Paragraph 14 of the Annex specifically provi
for the allowance of interest during war on all claims within
embrace of Article 297. We think that this Honorable Court o
looked the provisions which we have quoted, and which seem clea

to bring claims against seized enemy property within the embrace of the provisions of that Article.

Wherefore, your petitioners submitting respectfully to this Honorable Court that its finding that interest was not allowable for the period of the war, was occasioned by overlooking the sections of Article 297 and the Annex thereto to which reference is hereinabove made, respectfully pray that this Honorable Court grant a rehearing herein to the end that upon such rehearing the judgment of the District Court of the United States for the Southern District of New York be modified to allow such interest, if this Honorable Court shall be so disposed, and your petitioners will as in duty bound ever pray, etc.

Benjamin Guinness et al., Copartners, Doing Business under the Firm Name and Style of Ladenburg, Thalmann & Co., Plaintiffs-Appellants and Appellees, Petitioners.

[fol. 78] Jurat showing the foregoing was duly sworn to by Harry B. Lake omitted in printing.

[fols. 79 & 80] In United States Circuit Court of Appeals

[Title omitted]

Order Overruling Petition for Rehearing—May 3, 1924

A petition for a rehearing having been filed herein by counsel for the Plaintiffs;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

M. T. M.
J. M. M.

[fol. 81] In United States Circuit Court of Appeals

Clerk's Certificate

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 80 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Benjamin Guinness et al., Trustees, etc., Plaintiffs-Appellants, against Thomas W. Miller as Alien Property Custodian, etc., Defendants-Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of May in the year of our Lord One Thousand Nine Hundred and twenty-four

and of the Independence of the said United States the One Hundred and forty-eighth.

Wm. Parkin, Clerk. (Seal of United States Circuit Court of Appeals, Second Circuit.)

[fol. 82] In Supreme Court of the United States

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

Order Granting Petition for Certiorari—Filed June 9, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

[fol. 83] In Supreme Court of the United States

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

Order Granting Petition for Certiorari—Filed June 9, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.